

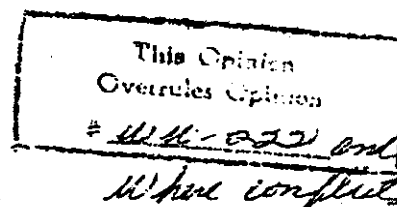


THE ATTORNEY GENERAL  
OF TEXAS

AUSTIN 11, TEXAS

WILL WILSON  
ATTORNEY GENERAL

June 23, 1959



Honorable George E. Gilkerson  
District Attorney  
Lubbock County Courthouse  
Lubbock, Texas

Opinion No. WW- 652

Re: Whether a proposed game known as "Orbit" would constitute a violation of the lottery laws, Article 654, Vernon's Penal Code.

Dear Sir:

You have requested an Opinion as to whether a game called "Orbit" would be a violation of Article 654 of Vernon's Texas Penal Code. The game "Orbit" as described in your request and in the advertising materials which you forwarded is similar to the well-known game of "Bingo" and the game of "Play Marko" as discussed in Attorney General Opinion WW-222.

Players play "Orbit" through a local television program for prizes. The cards carry advertising and are made available at participating stores. There is no obligation to buy any goods in order to be given a card and direct mailing to homes in a trading radius of each of the participating stores will be made. Each week three games of "Orbit" are played and one game of "Space" is played. "Space" is like "Orbit", but only people who have won at "Orbit" are eligible to play.

The only basic difference between "Orbit" and "Play Marko" is that "Orbit" cards are mailed within the trade radius while "Play Marko" cards were only available at the participating stores. Attorney General Opinion WW-222 held that "Play Marko" was a lottery.

It is well settled that a lottery consists of three essential elements, namely: (1) a prize or prizes, (2) the award or distribution of the prize or prizes by chance, and (3) the payment either directly or indirectly by the participants of a consideration for the right or privilege of participating. Cole v. State, 133 Tex. Crim. R. 548, 112 S.W.2d 725-730 (1937).

It is clear that the essential elements of "prize" and "chance" are present; the question raised here is whether there was payment of consideration. There is no "skill" question asked of winners as in "Play Marko".

In Brice v. State, 156 Tex. Crim. R. 372, 242 S.W.2d 433 (1951), the Court of Criminal Appeals stated:

"Under the authorities mentioned, we must conclude that in the absence of any character of favoritism shown to customers, the lottery statute, Art. 654, P.C., is not violated under a plan whereby a merchant awards a prize or prizes by chance to a registrant without requiring any registrant to be a customer or to purchase merchandise or to do other than to register without charge at the store, though the donor may receive a benefit from the drawing in the way of advertising."

Following this view, there is no consideration passing from the participants and, therefore, there is no lottery in the present case. The facts in the present case are even less like a lottery than the facts in the Brice case because in the present case the participant need not go to the store to pick up the "Orbit" card. See also Attorney General Opinions V-167, S-49 and MS-94.

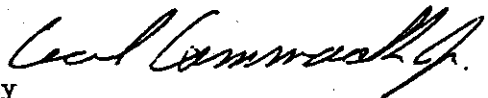
This opinion overrules Attorney General Opinions WW-222 and O-2286 insofar as they conflict with the holding of this opinion.

SUMMARY

The game "Orbit" is not a lottery in violation of Article 654, Vernon's Penal Code, because it does not involve all the elements of a lottery, namely: (1) getting a prize, (2) based on chance, and (3) the payment of a consideration for participation in the game, because the element of consideration is lacking.

Very truly yours,

WILL WILSON  
Attorney General of Texas

  
By  
Cecil Cammack, Jr.  
Assistant Attorney General

CC:aw

Honorable George E. Gilkerson, Page 3. (WW-652)

APPROVED:

OPINION COMMITTEE:

C. K. Richards, Chairman

J. C. Davis Jr.

J. Arthur Sandlin

Gordon C. Cass

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REVIEWED FOR THE ATTORNEY GENERAL

BY:

W. V. Geppert